In The

Supreme Court of the United States

[illegible]

[illegible] DONALD SIMONSON,

Petitioner,

versus

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), governing the exercise of peremptory challenges by prosecutors in criminal cases should be extended to nongovernmental litigants in civil jury trials?

LIST OF PARTIES AND CORPORATIONS

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Plaintiff-Petitioner

Leesville Concrete Company, Inc.
Defendant-Respondent

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No. 89-7743

In The

Supreme Court of the United States

October Term, 1990

THADDEUS DONALD EDMONSON,

Petitioner,

versus

LEESVILLE CONCRETE COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 860 F.2d 1308 (5th Cir. 1988). The decision of the U.S. Court of Appeals, Fifth Circuit, sitting *en banc*, is reported at 895 F.2d 218 (5th Cir 1990).

STATEMENT OF THE CASE

This case arises out of an accident which occurred on or about June 18, 1984, at Fort Polk, Louisiana. [R.1] The

petitioner **Thaddeus Donald Edmonson**, while engaged in the course and scope of his duties for Tanner Heavy Equipment Company, was caught between the back bumper of a cement truck and the front of a curb-and-gutter machine. The cement truck owned by respondent, **Leesville Concrete Company, Inc.**, was proceeding ahead of the curb-and-gutter machine at a slow pace up a slight incline, feeding cement from a chute on the cement truck into a hopper of the curb-and-gutter machine. [R.123] Petitioner's job was to make sure the cement flowed smoothly. The cement truck driver, an employee of the respondent, had stopped the truck and was starting to shift gears to move forward when the truck rolled back.

Edmonson sued Leesville Concrete Company, Inc., for negligence in the United States District Court for the Western District of Louisiana on October 19, 1984, alleging federal subject matter jurisdiction under 28 U.S.C. 1331 by virtue of the accident having occurred in a federal enclave.

Defendant-respondent denied that its employee was negligent and maintained, in the alternative, that the plaintiff was guilty of contributory negligence in positioning himself between the two vehicles despite warnings not to do so. Additionally, defendant maintained that the vast majority of plaintiff's injuries either did not exist or were unrelated to the accident.

The case came on for trial on July 27, 1987. The court conducted the jury voir dire. J.A. 13 et. seq. After the exercise by both counsel of their three peremptory challenges, counsel for the plaintiff-petitioner asked the court to note that two of the three jurors challenged by counsel

for defendant were black and that the plaintiff was black. J.A. 46-47. Plaintiff's counsel argued that the United States Supreme Court case of *Batson v. Kentucky*, 476 U.S. 79 (1986), applied to the selection of a petit jury in a civil trial and asked that counsel for the defendant articulate a race-neutral explanation for the exercise of his peremptory challenges. The trial Court denied the request, J.A. 49, holding that the principle announced in *Batson* was limited to criminal proceedings and also that there had been no discrimination in the jury selection procedure. J.A. 52-53.

On August 5, 1987, the jury rendered its verdict, finding the damages in the sum of $90,000.00 with 80% negligence on the part of Edmonson, and 20% negligence on the part of Leesville Concrete Company, Inc.

Petitioner appealed to the U.S. Court of Appeals for the Fifth Circuit. A three-judge panel issued its opinion on December 5, 1988, holding by a two-to-one majority that the United States Supreme Court's decision in *Batson v. Kentucky, supra*, applies to counsel representing a private individual in a civil action. On January 23, 1989, the Fifth Circuit granted a rehearing *en banc*. Then on March 1, 1990, the Fifth Circuit *en banc* affirmed the decision of the trial court in an opinion for nine judges with another two judges who specially concurred and a third judge who concurred in the result. Four judges dissented, including two judges who were in senior status.

SUMMARY OF ARGUMENT

The question whether *Batson v. Kentucky*, 476 U.S. 79 (1986), should be applied to nongovernmental litigants in civil cases is an important one to every attorney who litigates civil cases in federal and state courts. *Batson* held that a black defendant could in an individual criminal action establish a prima facie case of racial discrimination in the prosecutor's exercise of peremptory challenges against black members of the venire and thereby require the prosecutor to provide a "race neutral" reason for striking the juror. The holding was based on the equal protection clause of the Fourteenth Amendment, not the Sixth Amendment as *Batson* had argued.

The respondent in the case before the Court, Leesville Concrete Company, Inc., contends that *Batson* does not apply to civil cases. First, the "state action" doctrine as developed by this Court in a series of cases does not warrant the conclusion that the action of private attorneys is state action under the test of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Even in criminal cases, this Court has indicated that a public defender, though paid by the state, is not engaged in state action when representing a client in court. *Polk County v. Dodson*, 454 U.S. 312 (1981). If a state-paid public defender's actions before a trial judge do not constitute state action, it is difficult to understand how the exercise of peremptories by a privately-paid attorney representing a nongovernmental party before the same judge becomes state action.

A holding that *Batson* applies to nongovernmental parties in civil litigation necessarily will lead to a *de facto* application of a "cross-section of the community" standard to the petit jury. Although *Batson* involves equal

protection and *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990) has refused to incorporate *Batson* into the Sixth Amendment, the mechanics of jury-selection will result in the reverse: namely, incorporating the Sixth/Seventh Amendment cross-section standard into *Batson* and its equal protection rationale. That result would follow because, if extended to civil cases, *Batson* would be available to both plaintiffs and defendants. When each side accuses the other of a *Batson* violation involving different, identifiable groups, and especially with multiple parties plaintiff and defendant, the judge will be faced with an impossible situation. The judge will be required to inquire of and make decisions on a series of charges and counter charges. In such a situation, "there is every reason to believe that many commonly exercised bases for peremptory challenge would be unavailable." *Holland v. Illinois*, 110 S.Ct. at 810 (1990). As a practical matter, judges would severely limit and legislatures would probably eliminate peremptories. Petit juries then would reflect, as federal jury pools now do, the cross-section of the community standard.

While legislatures are always free to do so, this Court has declined to require the elimination of peremptories. As this Court has observed, it could be argued that "the requirement of an 'impartial jury' *compels* peremptory challenges." *Holland v. Illinois*, 110 S.Ct. at 808. In fact, the origin of the federal provision for peremptories in civil trials shows Congress intended them as a means to assure an unbiased jury.

For these and other reasons, the *en banc* decision of the Fifth Circuit Court of Appeals should be AFFIRMED.

ARGUMENT

The only issue in this case has been, and properly remains, whether the Constitution's guarantee of equal protection[1] as applied in *Batson v. Kentucky*, 476 U.S. 79 (1986), is implicated when peremptory challenges are exercised by nongovernmental parties in civil litigation.[2] Our answer is an empathetic no!

The plaintiff-petitioner raised and the trial court rejected the constitutional issue based on *Batson*. J.A. at 53. Petitioner's counsel mentioned the Sixth Amendment and, after the trial court ruling, corrected himself and specified the Seventh Amendment. J.A. at 3. On appeal one of the petitioner's briefs listed the Seventh Amendment, the right to an impartial jury, and the alleged unconstitutionality of 28 U.S.C. § 1870 as issues, but his

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[1] Although this case involves the equal protection component of the Fifth Amendment's due process clause, see *Bolling v. Sharpe*, 347 U.S. 497 (1954), this brief will generally refer to "state action" without distinguishing between state and federal action.

[2] The reference to "nongovernmental" rather than "private" parties distinguishes the status of the parties in this case from defendents in civil rights cases who may be employed as state officials, e.g., a sheriff. While certainly **not** urging that *Batson* applies to parties in civil rights litigation, we recognize that arguments can be made to distinguish their situation from that of the normal private litigant. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert denied*, 110 S.Ct. 201 (1989) and *Reynolds v. City of Little Rock*, 893 F.2d 1004 (8th Cir. 1990), *petition for cert. filed* (06/25/90) 59 U.S.L.W. 3053, apply *Batson* to civil actions brought under § 1983. *Reynolds*, but not *Fludd*, includes only governmental litigants within its holding. *Fludd* makes no such distinction.

argument did not actually discuss those as issues distinct from *Batson*.[3] Both the panel and the *en banc* opinions of the Fifth Circuit ruled only on *Batson*. In this Court, the petitioner has for the first time suggested reaching the same result by applying *Batson* to private parties as a matter of supervisory jurisdiction and an amicus[4] has urged this Court to find *Batson* implied in congressional statutes. The proposed supervisory[5] and statutory routes have been chosen apparently to avoid the fundamental constitutional difficulty of extending *Batson* to private parties, i.e., the absence of state action. The state action hurdle has become more significant since this Court declined last term to extend *Batson* to the Sixth Amendment in *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990).

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[3] Plaintiff-Appellant's "Supplemental or Alternatively, Reply Brief in the U.S. Court of Appeals for the Fifth Circuit" (6/24/88).

[4] "Brief Amicus Curiae in Support of Petitioner of the NAACP Legal Defense Education Fund, Inc., Lawyers' Committee for Civil Rights Under Law, and American Jewish Committee" (hereinafter Amicus Br.).

[5] To support the claim based on supervisory jurisdiction, the petitioner for the first time introduces into his argument, through his statement of facts, Petititioner's Brief at 6, a fanciful notion that the peremptory issue is intertwined with credibility issues before the jury. It is too late to raise these matters at this stage of the litigation. Moreover, the finding of no discrimination in the selection process by the trial judge is inconsistent with the petitioner's claim. See J.A. 52-53.

I. THE EXERCISE OF PEREMPTORY CHALLENGES BY NONGOVERNMENTAL LITIGANTS DOES NOT CONSTITUTE "STATE ACTION" AND THEREFORE *BATSON V. KENTUCKY* DOES NOT APPLY TO THIS CASE.

In some sense, everything that happens within a government's jurisdiction is "state action;" that is, government could be deemed the "but for" cause of every act or failure to act. Either the state has enacted a law that governs the particular action, or it has failed to enact such law. Of course, the constitutional doctrine on state action has never been extended to such an extreme statist position. In a free country government is not responsible for every, or even most, of the acts of private persons.

The appellant does not seriously address the state action question, which was the controlling issue both before the panel and the *en banc* court at the appellate level. That is, he mixes *Batson*, which was decided on the basis of the Fourteenth Amendment's equal protection clause, with the "cross-section of the community" standard of the Sixth Amendment. App. Brief at 8. He suggests that the Court should extend *Batson* even if state action does not exist. (" . . . [p]etitioner does not concede state action is required in any classic sense for his position to prevail." App. Br. at 25).

Although appellant's discussion of state action is lacking, the issue requires a full treatment in this case. Thus, given appellant's reliance on the views of Judge Rubin, author of the panel opinion and the dissent to the *en banc* opinion, and the Eleventh Circuit's decision in *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), (see n. 2 *supra*), respondent will address those arguments directly.

See also Dunham v. Frank's Nursery & Crafts, Inc., No. 89-2109 (7th Cir.), 1990 U.S. App. LEXIS 21579 (12/12/90).

Judge Rubin's opinions concluded that the exercise of peremptory challenges by private parties constitutes state action.[6] In discussing the state action issue, his opinions cited the following cases from this Court, listed in date order: *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 353 U.S. 230 (1957); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Abney*, 396 U.S. 435 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149 (1978); *Polk County v. Dodson*, 454 U.S. 312 (1981); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982); and *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988). The original panel opinion rested its finding of state action principally on *Shelley*, *Burton*, *Lugar*, and *Tulsa Professional*. 860 F.2d. at 1312. When the *en banc* court decided state action did not exist, Judge Rubin in dissent emphasized *Burton*, *Reitman*, and *Lugar* and distinguished *Blum*, *Evans*, and *Polk County*, relied upon by the majority. Each of these cases has been discussed below to demonstrate that state action is absent.

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[6] For present purposes, no distinction is made between cases discussing "state action," as used in the Fourteenth Amendment, and cases discussing "under color of law," as used in 42 U.S.C. § 1983. See *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 928, n. 9 (1982).

A. The Exercise of Peremptory Challenges by a Nongovernmental Party in a Civil Case Does Not Constitute "State Action" Under *Shelley, Burton* and Cases Through 1970.

Whenever one wants to find state action, or to extend the scope of governmental responsibility, *Shelley* and *Burton* are the citations of choice. Thus, two terms ago the dissent in *DeShaney v. Winnebago Co. Dept. of Soc. Serv.*, 489 U.S. 189 (1989), relied on these cases. The majority held that a state was not responsible under the Fourteenth Amendment due process clause for injuries inflicted by a father on his son in a case in which government officials had received complaints about the father's child abuse. The Court deemed the matter one for state tort law, not for a civil rights action. The dissent, however, thought "*Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), suggest that a State may be **found complicit** in an injury even if it did not create the situation that caused the harm." 489 U.S. at 207 (Brennan, J., dissenting) (emphasis added).

The very expansiveness of *Shelley* and *Burton* limits their usefulness as authority. As Professor Gunther has cautioned about *Shelley*,

> If Shelley were read at its broadest, a simple citation of the case would have disposed of most subsequent state action cases. Some seemingly "neutral" state nexus with a private actor can almost always be found . . . Given the entanglement of private choices with law, a broad application of Shelley might in effect have left no private choices immune from constitutional restraints.
>
> G. Gunther, *Constitutional Law* (11th ed. 1985) at 879.

As for *Burton*, Professor Tribe in a discussion of *San Francisco Arts & Athletics, Inc. ("SFAA") v. United States Olympic Committee*, 483 U.S. 522 (1987), points out how much its precedential value has declined.

> Burton's dwindling precedential power is illustrated by the fact that the majority [in *SFAA*] mentioned the case only in a short footnote – evidently added only after the Court's entire omission of the case had been pointed out by the dissent, see id. at 2991, n. 12 (Brennan, J., dissenting) – even though Burton formed a central part of the SFAA's state action argument.
>
> L. Tribe, *American Constitutional Law* (2nd ed. 1988) at 1701, n. 13.

Yet, even at their legitimate best, *Shelley* and *Burton* are weak authority for the result urged by petitioner in this case. In both *Shelley* and *Burton* the state entity **purposefully participated** in discrimination. In *Shelley* the Court had before it a racially restrictive covenant which it **knowingly** enforced. As Professor Tribe acknowledges, *Burton* "can be understood as entailing an inference of **purposeful** racial discrimination by government." Tribe at 1701, n. 13 (emphasis added). No one has suggested that the trial judge in this case, or federal district judges generally, knowingly participated in discrimination. Moreover, the trial judge exonerated respondent of the charge made by the plaintiff. ("The court finds **there is no discrimination**, no violation of the law in the selection procedure." J.A. at 52-53 (emphasis added)).

The importance of the mental element of purposeful participation in known discrimination for determining

the threshold issue of state action is what marks *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957), and *Reitman v. Mulkey*, 387 U.S. 369 (1967), and distinguishes them from similar fact situations. In *Board of Trusts*, a "Board of Directors of City Trusts" was appointed pursuant to a state statute and administered a trust and school established by the will of Stephen Gerard for "poor white male orphans." In a *per curiam* opinion, this Court held the refusal to admit blacks in accordance with the will violated the Fourteenth Amendment because the Board was a state agency. The state appointed the Board and administered the trust and the school with full knowledge of the discriminatory purpose of the trust. That knowing participation in the discriminatory action was the critical element is evident from comparing *Board of Trusts* to another trust situation addressed in *Evans v. Abney*, 396 U.S. 435 (1970).

Before *Abney*, however, this Court decided *Reitman v. Mulkey*, 387 U.S. 369 (1967). *Reitman* was among the most expansive views taken of state action. "After Reitman and before Abney, some commentators, noting that no modern Court decision had rejected a discrimination claim because of the state action barrier, suggested that the concept was moribund." Gunther at 894 (footnote omitted). Nevertheless, even *Reitman* recognized that purposeful discrimination, within the context of the particular facts, was controlling on the finding of state action. California voters repealed an open-housing statute by a constitutional referendum, neutral on its face. This Court agreed with the California Supreme Court's finding of state action on the basis that the constitutional

amendment would "significantly encourage and involve the State in private discriminations." *Id.* at 381. This amounted to more than the state's merely taking a "neutral position." *Id.* at 374-75. Here the discriminatory purpose of the neutral-appearing constitutional provision transformed the private into state action.

While even *Reitman* turned on the critical consideration of discriminatory purpose, *Evans v. Abney*, 396 U.S. 435 (1970), made the point in a way particularly applicable to the present case. *Abney* involved a park given to the City of Macon, Georgia, in trust for whites only. In an earlier decision, *Evans v. Newton*, 382 U.S. 296 (1966), this Court had applied *Pennsylvania v. Board of Trusts, supra*, to hold that the park could not be operated in a racially discriminatory fashion. Thereafter, the Georgia courts ruled that because the intent of the trust could not be implemented, the operation of state law on trusts required the property be returned to the heirs of the testator. This Court affirmed the Georgia decision. The majority in *Abney* found the actions of the testator were not attributable to the judges because they lacked any racially discriminatory motive.

> In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will.
>
> 396 U.S. at 445.

Certainly, construing the will constituted state action; but the discriminatory acts of the testator, a private person, did not.

> The **only choice** the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind.
>
> *Id.* at 446 (emphasis added).

Abney turns on the state court's neutral administration of nondiscriminatory law. By this standard a judge's role vis-a-vis peremptory challenges cannot possibly constitute state action. The peremptory process involves even less choice than the Georgia judges had in *Abney*; the trial judge **has no choice.** Not only is the peremptory statute nondiscriminatory, it is also nondiscretionary. The trial judge **must grant** the challenge. Moreover, if demonstrable proof of discriminatory intent by the private party existed in *Abney* but was not attributable to the judge, why should the **mere allegation** of discriminatory intent made against a private party make the judge responsible for the unproven motives? As elaborated below, the conduct of the private party is not "fairly attributable" to the trial judge.

B. The Actions of the Private Litigants are not "Fairly Attributable" to the State: *Lugar, Tulsa Professional,* and Post-1970 Cases.

Before the early 1970s, it might have seemed that state action could be found wherever the state failed to root out discrimination or that the state action requirement might just wither away. With *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), a new era began in which "the

state action barrier remains and, indeed, has gained new strength." Gunther at 894. *Moose Lodge* refused to find state action on the granting of a state liquor license to a private club that excluded blacks. A contrary decision would have been supportive of the approach urged by the petitioner in the case *sub judice*. To find support in the post-1970 Supreme Court cases Judge Rubin's opinions have had to rely on nonequal-protection cases. In these cases, the process of "sifting facts and weighing circumstances" to determine state action, *Burton*, 365 U.S. at 722, necessarily did not involve the presence or absence of purposeful discrimination.

Jackson v. Metropolitan Edison Co., *Lugar*, and *Tulsa Professional* were due process cases. *Jackson* and *Lugar* have been grouped according to several theories about state action, including the so-called "public function" line of state action cases. See j. E. Nowak, R. D. Rotunda, and J. N. Young, *Constitutional Law* (3d ed. 1986) at 426-32 (hereinafter Nowak). *Jackson* "restricted the scope of public function analysis." *Id.* at 429. That happened again in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), which like *Lugar* was a debtor-creditor case. The results in *Flagg* and *Lugar*, however, conflicted with each other and demonstrated the "difficulty of predicting the outcome" in such cases. Nowak at 432. In *Flagg Brothers, Inc. v. Brooks*, this Court "held that there was no state action in the sale of a debtor's goods by a warehouseman who had the goods in his possession and who had a lien on the goods for unpaid storage charges." *Id.* at 430 (footnote omitted). On the other hand, *Lugar* held "that a debtor could challenge, as a violation of due process, the state procedure by which a creditor secured a pretrial writ of attachment

against his property based upon the creditor's ex parte petition." *Id.* at 432. What distinguished *Lugar* from *Flagg* was "[t]he involvement of the state judicial system in the issuance of the writ, and the involvement of the county sheriff in the execution of the writ . . . " *Id.*

As *Lugar* states, the question of state action turns on whether "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State." 457 U.S. at 937. This involves a two-part test to determine "state attribution." "[T]he first question is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority." *Id.* at 939. The "second question" as formulated in *Lugar*, is whether, under the facts of the case, the private parties "may be appropriately characterized as " 'state actors.' " Under this test, as Professor Nowak states, the private party would have to be performing a governmental function or be taking direction from a governmental agency.

> A majority of the current justices appear to believe that no private sector agency should be subjected to constitutional limitation of its autonomy unless it performs a delegated governmental function or is taking actions under the direction of state authorities.
>
> Nowak at 430 (footnote omitted).

Although written before *Tulsa Professional*, 485 U.S. 478 (1988), was decided, Professor Nowak's formulation of the test has not been altered by this or later cases. In *Tulsa Professional*, the Court held that an Oklahoma probate statute violated the Fourteenth Amendment due process clause because it failed to require notice by mail to

known creditors of a decedent's estate. The statute provided for the executor or executrix to give notice to the creditors of the deceased. 485 U.S. at 487. In this case, "the court **ordered** [the executrix] to fulfill her statutory duty by **directing** that she 'immediately give notice to the creditors,' " *Id.* (emphasis added), which she did through publication. This Court found the probate court's "involvement . . . so pervasive and substantial that it must be considered state action." *Id.* Here the probate court actually directed the private party. Moreover, the private party was fulfilling a "government function" in providing notice.[7]

Certainly a civil trial involves government action by virtue of the fact that a judge conducts the trial, but it does not follow, therefore, that every action occurring during trial is properly characterized as state action. As Professor Nowak observes, "[t]he *Shelley* decision should not be taken as holding that any judicial decree which disadvantages members of a racial minority violates the fourteenth amendment." Nowak at 434. The *en banc* opinion is correct in relying on the statement in *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) that "a government 'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must . . . be deemed to be that of the State" and that "[m]ere approval of or acquiescence in the initiatives of a

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[7] The basic requirement of due process has been the insistence that the state ensure its judicial procedures provide notice and the opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

private party is not sufficient to justify holding the State responsible . . . under the . . . Fourteenth Amendment' " 895 F.2d at 221-22, n. 8.

Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989), viewed the trial judge's role in a way contrary to *Blum*.

> In overruling the objection [to the use of peremptory challenges on racial grounds], which informed the court that the peremptory challenger **may** be excluding blacks from the venire on account of their race, the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes. Because the trial judge constitutes the discriminatory state actor under the equal protection clause, we conclude that there is no constitutional bar to the application of *Batson* to a civil suit.
>
> 863 F.2d at 828 (emphasis added).

In so concluding, the Eleventh Circuit found state action where none existed. As one commentator remarked about *Fludd*,

> The trial judge's search for state action is confined to occurrences that have already taken place. The court's focus should normally be on the conduct of the party making the peremptory challenge, in the light of all the relevant circumstances. The relevant actions and circumstances include those of the courtroom, the trial process, the surrounding judicial system, and the trial judge's own role and decisions up to the point of objection, including his excusing of those stricken jurors. If the facts do not supply sufficient state action, the trial court cannot supply state action by considering the possible incorrect ruling it would make in denying the *Batson* objection. If at the time of the objection there is

> insufficient state action, from whatever source, any objection to a peremptory challenge based on an alleged denial of equal protection must be overruled. The Eleventh Circuit's focus on the trial court's overruling of the defendant's objection and proceeding to trial as an element of the necessary state action, therefore, seems mistaken.
>
> Wright, "Litigating the State Action Issue in Peremptory Challenge Cases," 13 *American Journal of Trial Advocacy* 573, 583-84 (1989).

Moreover, the view of a trial judge's action taken in *Fludd* was inconsistent with this Court's decision in *National Collegiate Athletic Assoc. ("NCAA") v. Tarkanian*, 488 U.S. 179 (1988). That opinion stressed that a private party (the NCAA) did not become a state actor simply because state institutions participated in rule-making by the private party. As this Court said:

> [T]he question is not whether UNLV participated to a critical extent in the NCAA's activities, but whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's conduct into state action.
>
> 488 U.S. at 193.

Applying *NCAA* to the present case, the question should be whether the trial court's action in compliance with counsel's exercise of peremptories turned the private counsel's action into the court's action. If *NCAA* is applied, the answer is No!

NCAA's reliance upon *Polk County v. Dodson*, 454 U.S. 312 (1981), 488 U.S. at 196, was significant. *Polk County* held "that a public defender does **not** act under color of

state law when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding." 454 U.S. at 325 (footnote omitted) (emphasis added). *Polk County* acknowledged that a public defender acts under color of state law "when making hiring and firing decisions on behalf of the state" and might do so when "performing certain administrative and possibly investigative functions." *Id.* Nevertheless, this Court took the view that attorneys, other than the prosecutor, act in a private capacity when performing functions at trial. For this Court to conclude that the trial judge's allowance of peremptory challenges is state action would logically require a finding of state action when the trial judge allows peremptories by a criminal defendant. Although *Batson* left the issue open, the reaffirmance of *Polk County* in *NCAA* should have settled fairly well that criminal defense and, by implication, other nongovernmental attorneys are not state actors.

A discussion of state action was unnecessary in *Batson* given the presence of the prosecutor. Moreover, on this issue *Batson* did not over-rule *Swain v. Alabama*, 380 U.S. 202 (1965), which had already applied the equal protection clause to the prosecutor's use of peremptory challenges. Although *Batson* overruled *Swain* in part, it built on the principle in *Swain* that equal protection applies to the actions of the prosecutor. In announcing the principle, *Swain* presumed that the equal protection clause did **not** apply to defense counsel.

> Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. **The ordinary exercise of challenges by the defense counsel does not, of course, imply purposeful discrimination by state officials.**
>
> *Swain v. Alabama*, 380 U.S. 202, 227 (1965) (emphasis added).

Likewise, the action of attorneys for nongovernmental parties in civil litigation is not state action.[8]

II. CONFUSION OF EQUAL PROTECTION WITH OTHER CONSTITUTIONAL PROVISIONS WILL LEAD TO A CROSS-SECTION STANDARD IN THE PETIT JURY.

As in other cases involving peremptories, those who would extend *Batson* to this case have confused the equal protection and right to jury trial issues. The original panel opinion, without referencing the Sixth Amendment, seemed to have been influenced by cases applying the Sixth Amendment to the discriminatory use of peremptory challenges.[9] (Although the Seventh Amendment, not

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[8] Whether this Court would follow *Swain* on this point in a § 1983 action for a defendant acting under color of state law is not an issue presented by this case.

[9] Prior to the original argument of this case in the Fifth Circuit, the court requested counsel to be prepared to discuss several cases. Three of the cases listed under the heading of state action were the principal cases on which the opinion rested its finding of state action. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982); and

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the Sixth, governs civil trials, the Sixth Amendment discussion would, if applicable, extend by analogy to the Seventh Amendment.) This confusion should have, but has not, been put to rest by *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990).

A. The Equal Protection Rationale of *Batson* Differs from a Sixth or Seventh Amendment Rationale.

The original panel opinion in this case was the first federal appellate court to apply *Batson* to civil trials. Its operating assumptions were not based on *Batson* as evinced by its failure to mention intent in its statement of *Batson*'s holding. Thus, the initial extension of *Batson* to civil cases sprang from a blurring of an equal protection versus a Sixth or Seventh Amendment rationale, as implicit in the following:

> In *Batson*, the Supreme Court held that the equal protection clause of the Fourteenth Amendment forbids the prosecutor in a state criminal action to exercise peremptory challenges to remove members of the defendant's race from the venire.
>
> 860 F.2d at 1310.

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Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988). Another case, *People v. Gary M.*, 138 Misc. 2d 1081, 526 N.Y.S.2d 986 (1988), was not listed under state action but under "jury challenges." The panel opinion referred to *Gary M.* once, quoting it, however, in the section discussing state action. 860 F.2d at 1312 and n. 23. Following precedent in the Second Circuit, *Gary M.* held that both the Sixth Amendment and the Equal Protection clause make criminal defense attorneys' peremptory challenges subject to challenge by the prosecutor for discrimination. See also n. 14, *infra*.

Of course, *Batson*'s holding involved more than the removal of minorities from a criminal jury panel. As an equal protection case, intentional discrimination was an essential element. *Washington v. Davis*, 426 U.S. 229 (1976). Thus *Batson* concerned only removals based on purposeful discrimination, demonstrated through a long course of conduct by prosecutors.

Batson built on *Swain*, reversing it in part only. In *Swain*, this Court "warned prosecutors that using peremptories to exclude blacks on the assumption that no blacks could fairly judge a black defendant would violate equal protection." 476 U.S. at 101 (White, J., concurring). From *Swain* to *Batson*, "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remain[ed] widespread." *Id*. The record in criminal cases of *systematic* exclusion was the foundation for an inference of discriminatory intent, which together with the state action of the prosecutor provided the basis for the equal protection holding in *Batson*.

Repeated attempts have been made to break *Batson* away from its equal protection holding. Shortly after *Batson* there was an exchange between Justices Brennan and O'Connor in *Brown v. North Carolina*, 107 S.Ct. 423 (1986), a memorandum decision denying certiorari. *Brown* was a capital case in which the prosecutor had used the peremptories to eliminate persons who had reservations about the death penalty but who were not subject to challenge for cause. Justice Brennan insisted that *Batson*

imposed restrictions on the state's use of peremptories beyond the equal protection clause. ("The state, however, misses the wider significance of *Batson*: that the broad discretion afforded prosecutors in the exercise of peremptory challenges may not be abused to accomplish *any* unconstitutional end." 479 U.S. at 944-45.) Justice O'Connor strongly disagreed, stating:

> Outside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike a juror without giving any reason applies. Because a juror's attitudes towards the death penalty may be relevant to how the juror judges, while, as a matter of law, his race is not, this case is not like *Batson*.
>
> 479 U.S. at 942.

This Court's choice in *Batson* of the equal protection rationale was quite deliberate. Batson had argued the Sixth Amendment, not the equal protection clause. As Chief Justice Burger's dissent emphasized, the Court "granted certiorari to decide whether [*Batson*] was tried 'in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community.' " 476 U.S. at 112 (Burger, C.J., dissenting.) At oral argument, Batson "expressly declined to raise" the equal protection claim. *Id.* (See excerpt from transcript. *Id.* at 113-15.) In choosing to rest the decision on a ground not argued, as Chief Justice Burger's dissent observed, "the Court depart[ed] dramatically from its normal procedure without any explanation." *Id.* at 115. This was especially peculiar because, as one commentator notes, "the Sixth Amendment approach seems more consistent with the rationale of *Batson*, which turned on the effects of exclusion on those jurors being removed, rather than the

effects of exclusion on the defendant's trial." W. Pizzi, "*Batson v. Kentucky*: Curing the Disease but Killing the Patient," 1987 *Sup. Ct. Rev.* 97, 117 (hereinafter, "Pizzi").

Had *Batson* been decided on Sixth Amendment grounds, several things would have followed. First, a Sixth Amendment approach to *Batson* most assuredly would have been applicable also to defense counsel, an issue avoided in *Batson*, because the Sixth Amendment involves no "state action" hurdle. Moreover, as the Fifth Circuit observed in *United States v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986), *vacated and remanded*, 479 U.S. 1074 (1987), in reference to cases which at least in part were based on the Sixth Amendment, "every jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be prohibited."

More importantly, a decision based on the Sixth Amendment (and by extension, the Seventh Amendment) would have required judicial regulation of the racial mix in the jury. Under the Sixth Amendment cases the party claiming a violation of the amendment need not be of the same race as the excluded juror. *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990); *Duren v. Missouri*, 439 U.S. 357, 359, n. 1 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 526-31 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972). This is consistent with the Sixth Amendment's cross-section standard, which has evolved to become a near mirror-imaging of the racial composition of the community on the jury.[10]

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[10] *See Castaneda v. Partida*, 430 U.S. 482 (1977).

This Court has emphatically rejected the Sixth Amendment approach. *Lockhart v. McCree*, 476 U.S. 162 (1986), did so only five days after this Court avoided the Sixth Amendment issue in *Batson*.[11] In holding that the Constitution does not prohibit states from "death qualifying" juries in capital cases, this Court distinguished between the jury venire, to which the cross-section standard applies, and the petit jury, which is not subject to the cross-section standard:

> We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren v. Missouri*, 439 U.S. 357, 363-364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02, 42 L.Ed.2d 690 (1975). ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population"), *cf.* Batson v. Kentucky, ___ U.S. ___, ___, n. 4, 106 S.Ct. 1712, 1716, n. 4, 89 L.Ed.2d ___ (1986) (expressly declining to address "fair cross-section" challenge to discriminatory use of peremptory challenges). The limited scope of the fair-cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury, see *id.* at ___, n. 6, 106 S.Ct., at 1717, n. 6.

476 U.S. at 173-74 (footnote omitted.)

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[11] Batson had urged the Court to apply the Sixth Amendment by adopting the reasoning of *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) and *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979). Based on state constitutional analogs to the Sixth Amendment, these state cases reasoned that under the Sixth Amendment the petit jury should approach as closely as possible **proportional representation**. Both *Wheeler* and *Soares* postulated a "petit jury that is 'as near an approximation of the ideal cross-section of the community as the process of random draw permits.' " 387 N.E.2d at 516, quoting *Wheeler*, 583 P.2d at 762. See also n. 14 for references to some federal appellate cases following the Sixth Amendment approach.

Last term in *Holland v. Illinois*, 110 S.Ct. at 808 (1990), this Court followed *Lockhart*, quoting in part from the above language.

The quotation from *Lockhart* points up the tension with *Batson*. *Batson* reaffirms that juries are not required to approach a mirror-image of the community (" . . . we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various destructive groups in the population,' " 476 U.S. at 85, n. 6.) Yet, some of *Batson*'s language, taken to logical extremes, would produce just that result. By relying on the equal protection clause and the requirement of purposeful discrimination, though, *Batson* apparently attempts to avoid such a consequence. *Batson* should be read in light of *Lockhart* because "[t]he Court's decision to steer clear of the Sixth Amendment and the fair cross-section theory was no doubt heavily influenced by the fact that, at the time *Batson* was under consideration, it was wrestling with *Lockhart v. McCree*, 106 S.Ct. 1758 (1986) . . . " Pizzi at 121.

As the Court recognized in *Holland*, too broad a reading of *Batson* will result in requiring the mirror-imaging

of the community. For that reason, in part, this Court declined the invitation to "incorporat[e] into the Sixth Amendment the test . . . devised in *Batson* . . . " *Holland v. Illinois, supra* at 806. In rejecting the Sixth Amendment's cross-section standard, *Holland* followed *Lockhart*, which stated:

> We remain convinced that an extension of the fair-cross-section requirement to petit juries would be unworkable and unsound . . .
>
> 476 U.S. at 174.

B. This Court Should Reject What, In Practice, Will Require a "Cross Section" in the Petit Jury

The panel opinion in this case nowhere referred to proportional representation on juries. Nevertheless, that would not have prevented proportionality from being the ultimate result. In *Teague v. Lane*, 489 U.S. 288 (1989)[12]

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[12] In *Teague v. Lane*, 489 U.S. 288 (1989), the petitioner had urged, *inter alia*, that the Sixth Amendment's fair cross-section requirement should be applied to the petit jury. Justice O'Connor determined "that the rule urged by the petitioner should not be applied retroactively to cases on collateral review, [and therefore] decline[d] to address the petitioner's contention." *Id.* at 299. On this part of the opinion Justice O'Connor wrote for a plurality of four, while writing for a majority on other parts of the opinion. Justice White disagreed with Justice O'Connor on the issue of retroactivity to cases on collateral review but concurred in the judgment. Justice Brennan, in dissent, agreed with the petitioner's Sixth Amendment claim, contending it was little different from *Batson*'s Equal Protection holding. *Id.* at 341-42. Justice Brennan disputed with Justice O'Connor over whether recognizing the Sixth Amendment claim would require **proportional representation** of the races on juries. Justice O'Connor insisted that it would:

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and in *Holland*, 110 S.Ct. at 809, this Court has noted that even a disclaimer of any intention to require proportional

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The dissent asserts that petitioner's fair cross section claim does not embrace the concept of proportional representation on the petit jury. Post, at ___ - ___. Although petitioner disavows such representation at the beginning of his brief, he later advocates adoption of the standard set forth in *Duren v. Missouri*, 439 U.S. 357 (1979), as a way of determining whether there has been a violation of the fair cross section requirement. See Brief for Petitioner 15-16. In order to establish a prima facie violation of the fair cross section requirement under *Duren*, a defendant must show: (1) that the "group alleged to be excluded is a 'distinctive' group in the community;" (2) that the representation of the group "is not fair and reasonable in relation to the number of such persons in the community;" and (3) that the underrepresentation of the group "is due to systematic exclusion of the group in the jury selection process." 439 U.S. at 364. The second prong of *Duren* is met by demonstrating that the group is underrepresented in proportion to its position in the community as documented by census figures. *Id.* at 364-366. If petitioner must meet this prong of *Duren* to prevail, it is clear that his fair cross section claim is properly characterized as requiring "fair and reasonable" proportional representation on the petit jury. Petitioner recognizes this, as he compares the percentage of blacks in his petit jury to the percentage of blacks in the population of Cook County, Illinois, from which the petit jury was drawn. See Brief for Petitioner 17-18 (arguing that blacks were underrepresented on petitioner's petit jury by 25.62%) **In short, the very standard that petitioner urges us to adopt includes, and indeed requires, the sort of proportional analysis we declined to endorse in** *Akins v. Texas*, 325

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representation will not necessarily suffice. Similarly *McCleskey v. Kemp*, 481 U.S. 279 (1987), demonstrated concern not to knock the dominoes that end in proportionality. *McCleskey* rejected equal protection and Eighth Amendment challenges to Georgia's capital punishment statute under which persons who had murdered whites and murderers who were black more frequently received the death penalty. It emphasized it would not give significance to statistical disparities in the criminal justice system regarding race beyond the limited exception of jury venires[13] because the "claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system." 481 U.S. at 314-15. Specifically, the case noted,

> [T]he claim that his [McCleskey's] sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexpected discrepancies that correlate to membership in other minority groups, and even to

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U.S. 398, 403 (1945), and *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

489 U.S. at 301-02, n. 1 (emphasis added).

[13] "The Court has accepted statistics as proof of intent to discriminate in certain limited contexts. First, this Court has accepted statistical disparities as proof of an equal protection violation in the selection of the jury venire in a particular district.

. . .

But the nature of the capital sentencing decision, and the relationship of the statistics to the decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases." 481 U.S. 279 (1987) at 293-94.

gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could – at least in theory – be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decision making.

481 U.S. 279 (1987) at 315-18 (footnotes omitted).

Significant expansion of *Batson* along any of several lines could lead to the kind of proportional representation rejected by a majority of this Court. *Holland* has closed the Sixth Amendment avenue which was being used for claims coming from other groups.[14] 110 S.Ct. at 810. Nevertheless, new possibilities are presented this

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[14] Prior to *Holland*, at least, *Batson* was being extended through the Sixth Amendment in some circuits. See *Alvarado v. United States*, ___ U.S. ___, 110 S.Ct. 2995 (1990). For example, *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988), *affirming* 673 F. Supp. 96 (E.D.N.Y. 1987) upheld a decision that Italian-Americans are a "cognizable racial group" under *Batson*. While the district court was "satisfied beyond a reasonable doubt that the prosecutors did not engage in purposeful discrimination," 673 F. Supp. at 105, the case compares the percentage of jurors of Italian descent on the defendant's jury with the proportion of Italian-Americans in the population of the locale in which the

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term as the Court has before it, in addition to this case, several other jury selection issues involving *Batson*.[15]

Batson itself need not involve proportionality in the petit jury because the inquiry is limited to the race of the defendant. Gender, *see United States v. Gross*, ___ F.2d ___ (9th Cir.), 48 Cr. L. R. 1001 (10/3/90), and multiple races among defendants in the same case may complicate

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case was tried. The decision follows language in *Roman v. Abrams*, 822 F.2d 214, 229 (2d Cir. 1987), which makes a *Batson*/Sixth Amendment challenge turn not on purposeful discrimination but on the proportion of representation of the "cognizable group" on the actual jury.

> Where, however, the actions of the prosecutor have not succeeded in excluding the targeted group and have not reduced the petit jury representatives of that group dramatically below the group's percentage in the venire or in the population of the community, it is difficult to see that the defendant has in fact been denied the possibility that the Sixth Amendment guaranteed him. Rather, if that group is not significantly underrepresented, it appears that the possibility constitutionally guaranteed to the defendant has come to fruition and that the defendant has therefore not been injured by the prosecutor's efforts to eliminate the cross-section possibility.
>
> 822 F.2d at 229.

[15] *Powers v. Ohio*, No. 89-5011, argued 10/9/90 (whether a white defendant has standing to raise an equal protection clause challenge under *Batson* to the striking of a black juror); *Hernandez v. New York*, No. 89-7645 (whether a prosecutor's explanation of a challenge of an Hispanic juror was "race neutral" under *Batson*); *Ford v. Georgia*, No. 89-6796, argued 11/6/90, (whether defendant properly preserved a *Batson* claim).

matters somewhat. With a few expansions of *Batson*, however, the tendency toward proportionality may be unstoppable. If each side in a criminal or civil trial is able to apply *Batson* to the other side, then two or more racial groups would come into conflict. In cases of multiple plaintiffs or defendants, many potential racial, ethnic, and other groups may be involved. If standing under *Batson* and equal protection (*See Powers v. Ohio*, No. 89-5011, argued 10/9/90, on equal protection grounds as opposed to the Sixth Amendment, see *Holland, supra*, at 805) should be relaxed to allow a defendant to challenge the state's striking of a racial group other than his own, the number of racial groups would become limited only by the number in the population. A court faced with challenges involving multiple racial and other groups would be driven to enforcing a near mirror-image of the community on the jury, even though *Batson* declined to impose such a requirement. See *Batson*, 476 U.S. at 85, n. 6.

A particular problem which affects the respondent, **Leesville Concrete Co., Inc.**, is the manner in which *Batson* would apply to corporate parties. As the original panel opinion noted, the plaintiff in this case, a black man, used all of his challenges to remove white jurors. If *Batson* applies in civil cases, it should be available to Leesville and other corporations in the future. *But see Dias v. Sky Chefs, Inc.*, No. 89-35778 (9th Cir.), 1990 U.S. App. LEXIS 20587 (11/27/90). As this Court has acknowledged, corporations are "persons" protected under the Fourteenth Amendment equal protection clause. See *Santa Clara County v. So. Pac. R.R.*, 118 U.S. 394 (1886). The respondent wonders how the race of the corporation

would be determined. Would it be the race of the chief executive officer, the board of directors, or the shareholders? With a multiracial board or group of stockholders, would the corporation get the benefit of all the races or merely of the majority race represented on the board or among the stockholders? As these questions suggest, application of *Batson* quickly would have more wide-reaching consequences on the composition of civil juries than of criminal juries.

The reasons for rejecting a cross-section requirement in the jury are not primarily for administrative convenience, nor even to preserve the peremptory challenge – although such concerns are not minor. The more important reason is "the divisive implication that such a concept implies: that without such a system jurors would be unable to be impartial." Pizzi at 120, n. 150. As stated in *Ristaino v. Ross*, 424 U.S. 589, 596, n. 8 (1976):

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption . . . that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.

See also *Richmond Va. v. J. A. Croson*, 488 U.S. 469 (1989).

Moreover, for trial judges to involve themselves in balancing the racial mix of the petit juries would violate congressional legislation on jury selection. Congress has established the jury selection procedures, discussed below, which both carefully guarantee the representativeness of the jury pool and also preserve peremptories. This system has been designed to eliminate discretion and subjective factors, even by judges, except as specifically provided. To inject judicial discretion into this process,

runs the risk of creating new opportunities for discrimination in the jury compilation – a consequence Congress sought to guard against in the Jury Selection and Service Act of 1968.

III. THE STATUTORY PROVISION FOR PEREMPTORY CHALLENGES IN CIVIL CASES IS QUITE CONSISTENT WITH ANTIDISCRIMINATION STATUTES AND POLICIES.

Failing the constitutional argument, the petitioner advances no legitimate rationale for overturning the *en banc* opinion of the Fifth Circuit. Unless constitutionally defective, the congressional statute giving each party three peremptory challenges, 28 U.S.C. § 1870, must be given effect.[16] Its language is mandatory: "In civil cases, each party **shall** be entitled to three challenges"

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[16] Petitioner suggested at one point that 28 U.S.C. § 1870 is unconstitutional, but he has not pursued that argument. Nor could he do so successfully. Despite Justice Marshall's statement concurring opinion in *Batson* that the "goal [of ending racial discrimination in the jury-selection process] can be accomplished only by eliminating peremptory challenges entirely," 476 U.S. at 103 (Marshall, J., concurring), there seems to be no constitutional basis for such a view. As the majority noted,

> "Nor do we think that this historical trial practice, which long has served the selection of an impartial jury, should be abolished because of an apprehension that prosecution and trial judges will not perform conscientiously their respective duties under the Constitution."
>
> 476 U.S. at 99, n. 22.

(emphasis added). The only discretion given to the trial judge involves multiple parties, in which case the judge may decide whether to allow additional peremptories.[17]

28 U.S.C. § 1870 is neutral on its face. The party exercising the challenge not only need not, but does not and should not, give a reason for doing so. Thus, if an attorney strikes a potential juror whose demeanor appears to him to suggest untrustworthiness, the attorney would not and should not volunteer that he is striking the juror because he thinks him untrustworthy. A peremptory challenge is not peremptory (i.e., "self-determined, arbitrary, not requiring any cause be shown;" *Black's Law Dictionary* (6th ed.)) if a reason is given. In criminal cases a prosecutor may be called upon to give a reason and in that instance the challenge is not actually peremptory. This limitation imposed by *Batson* on a prosecutor's use of peremptories is purely a constitutional one. To acknowledge that the present case does not implicate the underpinnings of *Batson* as an amicus urges[18] and as petitioner comes close to doing,[19] amounts to conceding the appeal.

The statutory arguments of the petitioner and the amicus lack merit quite apart from the fact that the appellant cannot prevail except on the constitutional issue.[20]

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[17] "Several defendants or several plaintiffs may be considered as a single party for purpose of making challenges, or the cour may allow additional peremptory challenges and permit them to be exercised separately or jointly." 28 U.S.C. § 1870.

[18] Amicus Br. at 7-10

[19] *See* Petitioner's Brief at 25 ("At the outset it should be obvious petitioner does not concede state action is required in any classic sense for his position to prevail").

[20] In urging this Court to avoid the constitutional issue, the amicus brief contended the "original panel decision in

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The contention that 28 U.S.C. § 1870 "must be construed in light of the more specific provisions of federal laws prohibiting racial discrimination in jury selection," Amicus Br. at 5, conflicts with basic principles of statutory construction. Not only is section 1870 clear and unambiguous but it conforms with and is confirmed by other statutes with quite specific provisions governing nondiscriminatory jury selection. What the amicus calls for is not construction, but either rewriting the statute or placing a constitutional limitation on the statute without labeling it as such. Thus, the amicus writes: "We contend that section 1870 should be construed in a manner consistent with the constitutional rule in *Batson*." Amicus Br. at 13.

A. Section 1870 is Consistent with the Jury Selection and Service Act of 1968.

Section 1870 on its face does not conflict with any antidiscrimination statute; in particular, not with sections of the Jury Selection and Service Act of 1968, i.e., §§ 1861 or 1862 of Title 28.[21]

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petitioner's favor . . . relied at least in part on a construction of section 1870," citing 860 F.2d at 1312. In the paragraph to which the amicus referred, the panel was not construing the statute but observing that it would be unconstitutional if it discriminated on its face.

[21] The amicus also discusses two other statutes: 42 U.S.C. § 1981 and 18 U.S.C. § 243, which are not here specifically addressed. The Jury Selection and Service Act of 1968, of which §§ 1861 and 1862 are a part, is one way of protecting those rights specified in 42 U.S.C. § 1981

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Section 1861 provides in part:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.

Section 1862 provides:

> No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.

Read in isolation, section 1861 might seem to require elimination of peremptories because it does not mention them as an exception to the policy of "grand and petit juries **selected at random** from a fair cross section of the community" (emphasis added). The section seems to require the composition of the petit jury itself be random. Given that the exercise of peremptory challenges prevents randomness, see *Holland v. Illinois*, 110 S.Ct. at 807, peremptories would seem inconsistent with the policy of the Jury Selection and Service Act stated in § 1861. As evident from section 1866, Title 28, part of the same act, no conflict does exist, however. The jury panel is randomly drawn from the jury wheel. 28 U.S.C. § 1866 (a)

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> All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

18 U.S.C. § 243, which is applicable only to certain state actors, does not add anything to this case not covered in the equal protection issue. *See* n. 6, *supra*.

and (b). But section 1866(c)(3) also provides for peremptory challenges.

> "No person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: **provided**, that any person summoned for jury service may be . . . (3) excluded on peremptory challenge as provided by law."

Thus, any question about construing § 1870 in light of § 1861 has been pretermitted by § 1866. Likewise, § 1866(c)(3) constitutes a clear exception, if one is needed, to the statement in § 1862.

In addition to the lack of conflict with the anti-discrimination statutes, the exercise of supervisory jurisdiction would be particularly inappropriate in this case given the ruling of the trial judge. After addressing the constitutional issue, the trial judge also found that there had been no discrimination in the jury-selection process: "The court finds there is no discrimination, no violation of the law in the selection procedure.[22]

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[22] The enlarged part of the trial judge's remarks are as follows:

> But again, for the record, so that the record is clear, so that the parties in the event that they want to appeal in the qualifying of eighteen jurors in order to pick twelve of the eighteen qualified, three were of the black race, the same as the plaintiff. The plaintiff certainly did not challenge any of the black jurors. He challenged nothing but white jurors. The defendant challenged two of the three black jurors and a white juror. The court finds there is no discrimination, no violation of the law in the selection procedure. And the motion to have the defendant articulate the reasons why he challenged the two

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As counsel for the defendant-respondent indicated to the trial judge, if he had been exercising his challenges on the basis of race (which he was not) he would have used his three challenges to strike all three black venire persons.[23] When the selection process was complete (which occurred before the plaintiff-petitioner without warning raised his claim based on *Batson*, see J.A. at 48-9), the jury of twelve included one juror who was black.

B. CONGRESS DEEMED PEREMPTORY CHALLENGES IN CIVIL TRIALS NECESSARY FOR A FAIR AND IMPARTIAL JURY.

If Congress wishes to rewrite or eliminate section 1870, it is free to do so. See *Frazier v. United States*, 335 U.S. 497, 505, n. 11 (1948). In origin, purpose, and effect, however, section 1870 is itself an antidiscrimination provision.

1) The Reconstruction Congress Initiated Peremptory Challenges in Civil Cases as a Means to Eliminate Bias from the Jury.

The origin of peremptory challenges in civil cases was entirely different from that in criminal cases. The

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(Continued from previous page)

> black jurors is denied. I make this on the record so that in the event of an appeal, the record will be clear as to the court's ruling.
>
> J.A. at 52-53.

[23] J.A. at 54, where respondent's counsel stated: "As an aside, I would note that both plaintiff and defendant were accorded three challenges. There were three blacks. And if it were discriminatory action, the three, my three challenges could have been asserted against the three blacks. That had nothing to do with the matter. I simply threw that in as an aside remark."

only form of peremptory challenge recognized under the common law was that provided to defendants in criminal cases; as a practical matter, even it was largely limited to defendants in criminal cases. *Swain v. Alabama*, 380 U.S. 202, 211-13 and n. 9 (1965). Under the common law, no party in a civil case was accorded any peremptory challenges. J. Profatt, *A Treatise on Trial by Jury*, §§ 155, 163 (1877); *Kabatchnick v. Hanover-Elm Bldg. Corp.*, 331 Mass. 366, 119 N.E. 2d 169, 172 (1954); *Sackett v. Ruder*, 152 Mass. 397, 25 N.E. 736, 738 (1890); and *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N.W. 53, 55 (1896). Thus, when the Constitution was adopted, the use of peremptory challenges in civil cases was virtually unknown. Profatt, § 163. Legislation in 1790 authorized peremptory challenges in federal courts only in treason and capital cases, 1 Stat. 119; see *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803, 808 n. 1 (1990).[24]

The Reconstruction Congress in 1872 passed legislation which for the first time specifically provided peremptory challenges in federal civil cases.[25] This Act

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[24] Much of the argument in this section borrows, sometimes verbatim, parts of the "Brief Amicus Curiae in support of Petitioner filed by the NAACP Legal Defense and Educational Fund, Inc., the Lawyers' Committee for Civil Rights Under Law, and the American Jewish Committee," at 14. Attribution will be given only at the end of appropriate paragraphs. Amicus Br. at 14-15.

[25] 17 Stat. 282. In 1840 Congress authorized the federal courts to adopt local rules regarding jury selection based on state practice. 5 Stat. 394. This legislation was interpreted to authorize the adoption of local rules regarding peremptory challenges. *United States v. Shackleford*, 18 How. (59 U.S.) 588 (1856).

was part of Congress's attempt to increase the fairness of judicial proceedings. As the bill's sponsor, Representative Butler, explained:

> In civil cases in cities, where frequently we get a merchant on the jury, he may be as much interested as the man whose case is being tried, and it is necessary to get him off the jury. We therefore amend the law by entitling each party in such cases to three peremptory challenges.[26]

Coming only four years after the ratification of the Fourteenth Amendment and following closely after the Civil Rights Acts of 1866 and 1871, the Congress was certainly conscious of ensuring equal justice for all. In civil as well as criminal cases, the Congress was saying, **"What we aim at here is to get a fair jury."** Cong. Globe 42d Cong., 2d Sess., 3412 (1872) (Representative Butler, emphasis added).[27]

As this Court observed last term, "[o]ne could plausibly argue (though we have said the contrary, see *Stilson v. United States*, 250 U.S. 583, 586, 40 S.Ct. 28, 29-30, 63 L.Ed. 1154 (1919)), that the requirement of an 'impartial jury' impliedly *compels* peremptory challenges, . . . " *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803, 808 (1990). The respondent does **not** contend that peremptory challenges in civil cases are constitutionally required for a fair and impartial jury. But it seems clear that, as a matter of legislative policy, the Reconstruction Congress adopted peremptories in federal civil trials as a means of achieving fair and impartial jury trials.

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[26] Cong. Globe, 42d Cong., 2d Sess., 3411 (1872) (Rep. Butler).

[27] Amicus Br. at 15, 19, and 21.

2) Congress Has Treated Peremptories in Civil and Criminal Cases Differently.

Besides historical development, peremptories in civil cases differ from criminal cases in other important respects. Although the 1872 Act providing for civil trial peremptories also included peremptories in criminal cases, 17 Stat. 282 (1972), important differences in legislative policy between criminal and civil trials are reflected in the number and allocation of peremptories. In criminal cases then and now, Congress has given the defendant more (originally many more) peremptories than it has given to the government. In civil cases then and now, each party has been given three peremptories. The record shows Congress was concerned in 1872 to counter the weight of prosecutorial power.

> 'We give the defendant more because the defendant is sometimes oppressed by the whole powers of the government; sometimes he has the whole government down upon him."
>
> Cong. Globe, 42d Cong., 2d sess., 3412 (1872).

Although the prosecution is entitled to a fair trial, only the criminal defendant has the right to a jury trial under the Sixth Amendment.[28]

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[28] Rule 23 of the Federal Rules of Criminal Procedure conditions defendant's right to waive a jury trial on agreement by the prosecution. This provision has been upheld on the basis that a criminal defendant has no right as such to a nonjury trial. *Singer v. United States*, 380 U.S. 24 (1965). The fact, however, that a rule in effect allows the government to have a jury when the defendant would waive the jury does not mean the prosecution has a constitutional right to jury trial.

While such disparities between the prosecution and the criminal defendant on peremptories need not exist, they are constitutionally permissible as a matter of legislative policy. No such inequalities in peremptories do or should exist between plaintiffs and defendants in federal civil cases. Both parties have a Seventh Amendment Right of Jury Trial. Even though the Seventh Amendment has not been made applicable to the states, neither should disparities on peremptories in state civil trials exist because presumably affording a greater number of peremptories to either plaintiff or defendant in civil cases, whether in a state or federal court, would violate equal protection.[29]

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[29] For purposes of equal protection, civil and criminal cases have been treated differently in other contexts by this Court. Few Supreme Court criminal cases have relied on the equal protection clause because of the availability of the due process clause of the Fourteenth Amendment and the specific guarantees of the Bill of Rights. The most significant cases are those holding that the equal protection clause requires government to provide an indigent with counsel for a first appeal of right, *Douglas v. California*, 372 U.S. 353 (1963) and *Ross v. Moffitt*, 417 U.S. 600 (1974), and also to waive filing and transcript fees for an indigent. *Griffin v. Illinois*, 351 U.S. 12 (1956). Indigent litigants in noncriminal cases certainly do not enjoy these same protections. *United States v. Kras*, 409 U.S. 434 (1973), holds that the equal protection clause does not require waiver of the filing fee in a bankruptcy proceeding, distinguishing *Boddie v. Conn*, 401 U.S. 371 (1971), which had held the Fourteenth Amendment's due process clause requires waiver of fees for an indigent seeking a divorce. Also *Ortwein v. Schwab*, 410 U.S. 656 (1973), upholds state filing fees for appellate court review of an agency's reduction in welfare payments.

Even where the number of peremptories for the prosecution and the defendant are equal, criminal cases generally allow for more peremptories than civil cases. The federal system permits up to twenty peremptories per side in criminal cases. A large number of peremptories, "makes the jury more homogeneous than the population at large – because each side is eliminating the persons who are suspected of holding extreme positions on other side – and to that extent the jury becomes less representative." J. M. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* (1977) at 168 (hereinafter, "Van Dyke"). That Congress and generally the states allow more peremptories in criminal trials seems to reflect a greater concern for "extreme positions" of potential jurors in criminal cases. This concern along with the distinguishing features of a criminal case, i.e., the power of the state and the judgment of the community, certainly offers a rational basis for treating criminal cases differently.

On the other hand, a large number of challenges in criminal cases means potentially more distortion in the racial composition of the jury. See Van Dyke at 169. That factor together with the long-standing jury-selection practices of prosecutors, see *Batson*, 476 U.S. at 99, suggests a greater likelihood of discrimination in criminal cases. Yet even though randomness in the petit jury would eliminate this distortion in the racial composition, it has not been constitutionally required in criminal cases, *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986),[30] nor even

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[30] See discussion *supra* in text accompanying n. 11.

deemed desirable because it "would cripple the device of peremptory challenges." *Holland v. Illinois*, 110 S.Ct. at 809 (1990).

By providing peremptory challenges, Congress allows the litigants to distort the near-randomness that otherwise would exist in the petit jury. Under the Jury Selection and Service Act of 1968, the pool of jurors in federal court from which the grand and petit jury selections are made, aims at randomness. 28 U.S.C. § 1861. The Act's purpose is to secure a fair and impartial jury – which is assumed will result from randomness.[31] Of course, the random selection process applied in a community generally biased against a criminal defendant would not produce a fair and impartial jury. The solution in such a criminal case would be a change of venue.[32] Thus, the jury selection process sometimes involves a tension

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[31] Prior to the Jury Selection and Service Act of 1968, as explained in an article by Judge Gewin, "The Jury Selection and Service Act of 1968," 20 *Mercer L.Rev.* 349, the "key man" system was the "most widely employed method of selecting jurors" in federal court. *Id.* at 354. This system permitted jury commissioners a great deal of discretion and was not at all random. *Id.* Statistical studies demonstrated that necessarily the key-man system resulted in great disparities between the eligible population and jurors chosen. *Id.* Nevertheless, "[t]he satisfactory performance of key-man juries caused the Judicial Conference to endorse the system for a number of years in spite of its inherent deficiencies." *Id.* at 35. It was not until 1966 that the Judicial Conference "endorsed the principle of random selection of jurors in a manner that would produce a fair cross section of the community . . . " Kaufman Report, 42 F.R.D. at 358, quoted by Gewin at 357.

[32] The criminal procedural provision reflects concerns of fundamental fairness different from the concerns of convenience involved in a change of venue in civil cases under the doctrine of forum nonconveniens. *See* 28 U.S.C. § 1404(a).

between randomness and fairness. Under the Jury Selection and Service Act of 1968, the goal in the petit jury, contrary to the assumption of one of the amicus briefs,[33] is not randomness, but a fair and impartial jury. Randomness in the general pool and challenges to the particular panel are merely means to the same end, an impartial jury. See *Holland v. Illinois*, 110 S.Ct. at 807 ("the Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury which the Constitution does not command), but an *impartial* one (which it does)." (emphasis in original).

C. Extension of *Batson* Undermines Congress's Purpose in Providing Peremptories in Civil Cases.

An important purpose of peremptory challenges is to permit a party to remove potential jurors believed to be, but not shown in fact to be, biased. A party "may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases the peremptory challenge is a protection against his being accepted." *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). As the legislative history of section 1870 – previously quoted[34] – reveals, Congress sought to provide litigants with a safeguard against biased jurors. Resort to peremptory challenge may also be necessary where a juror may have taken offense because a party had

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[33] Amicus Br. at 31.

[34] See text following n. 25.

sought, without success, to remove that juror for cause. *Swain v. Alabama*, 380 U.S. 202, 219-20 (1965).[35]

From these observations, amici for the petitioner conclude that the application of *Batson* is necessary to effect the intent of Congress.[36] However well-intentioned their policy conclusions, what amici advocate could just as well undermine the goals they hope to achieve. For example, suppose the trial attorney for a black litigant who believes a white (or Hispanic or Oriental, etc.) potential juror is racially biased questions that person in an attempt to establish a challenge for cause.[37] If the challenge for cause is denied, the litigant must – as a practical matter – challenge the juror peremptorily. If *Batson* is applicable, the opposing party is likely to allege racial motivation in the challenge. Based upon the prior questioning, the opponent has a basis for claiming a prima facie case. If so, the attorney for the black defendant would have to offer a "race neutral" reason. While trying to eliminate racial bias from the jury panel, the attorney's motivations have not been "race neutral." If the attorney is forced to explain his challenge and does so truthfully, the court would have to say it was not race neutral. The court might decide that, although not race neutral, the

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[35] Amicus Br. at 16-17.

[36] *Ibid.* at 17.

[37] Whether or not the lawyers can question the prospective jurors is a matter for the trial judge to determine. Fed. R. Civ. Proc. 47(a). By local rule in many districts, the federal judge does the questioning. In many states, however, attorneys are allowed to question the jury venire. Unless this case is decided on purely statutory grounds, the result will apply equally well in those state courts.

exercise of the peremptory was nevertheless justified. If justified (although "cause" has not been shown), what is to prevent other attorneys from targeting jurors of a race different from their clients' and engaging in questions they will later claim were designed to eliminate the juror for cause due to racial bias? If this result is allowed to come about, as it certainly will if *Batson* is extended to civil cases, this Court will have completely subverted the antidiscriminatory purposes which prompted Congress to create civil trial peremptories in the first place.

In response, the appellant might argue that *Batson* would no more undermine civil trial peremptories than it does criminal trial peremptories. First of all, however, *Batson* affects at this point only the exercise of peremptories by the prosecution. As to the prosecutor, the possible limitation on the usefulness of the peremptory is unique because the government does not have a right to jury trial and does not suffer from racial, ethnic, or religious discrimination as does an individual criminal defendant or private party litigant. The government is entitled to a fair trial, but historically that has been deemed satisfied even when the criminal defendant had peremptories and the government had none.

If applied to civil trials, each party necessarily would be able to raise the *Batson* issue. As previously indicated, the judge would then be required to inquire of and make decisions on a series of charges and counter charges. In such a situation, "there is every reason to believe that many commonly exercised bases for peremptory challenge would be rendered unavailable." *Holland v. Illinois*, 110 S.Ct. at 810 (1990). As a practical matter, judges would severely limit and legislatures would probably

eliminate peremptories. Petit juries then would reflect, as federal jury pools now do, the cross-section of the community standard.

Charting such a course would lead by indirection to a result rejected last term in *Holland*. Thus in essence, petitioner sails under a jury-rigged argument combining a Seventh Amendment rationale with *Batson's* more limited equal protection holding in a criminal context. No combination of constitutional provisions, cum penumbras, will bear the weight of that argument.

CONCLUSION

For the foregoing reasons, Respondent, **Leesville Concrete Company, Inc.**, respectfully urges that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed in all respects.

Respectfully submitted,

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